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Counsel for Defendant Ashiegbu

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	No. CR 07-0677 CRB
)	
Plaintiff,)	DEFENDANT'S MOTION IN
)	SUPPORT OF RULE 15
v.)	DEPOSITION
)	
ANDREW IHENTUGE ASHIEGBU,)	Date: June 11, 2008
)	Time: 2:15 p.m.
Defendant.)	Hon. Charles R. Breyer
_____)	

TO: THE UNITED STATES OF AMERICA, PLAINTIFF; AND JOSEPH P. RUSSONIELLO, UNITED STATES ATTORNEY, NORTHERN DISTRICT OF CALIFORNIA; AND ALLISON DANNER, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTE that on June 11, 2008 at 2:15 p.m., Mr. Andrew Ihentuge Ashiegbu will move this Court to authorize the pretrial deposition of Alice Anyanwu pursuant to Federal Rule of Criminal Procedure 15. This motion is based on the Constitution of the United States, all relevant case law and statutory authority, and such

1 argument as the Court will entertain at the motion hearing.

2 INTRODUCTION

3 As was detailed in counsel's letter to the Court of April 18, 2008, the testimony of
4 Alice Anyanwu will be of critical importance to defendant Ashiegbu's defense. The
5 central issue in this matter is whether or not co-defendant Doris Anyanwu, her mother
6 Alice Anyanwu, and defendant Ashiegbu lived together in the United States for a certain
7 period of time. Given that Alice is the only uncharged individual who can attest to the
8 complete truth of the central issue of co-habitation, the relevance and materiality of her
9 testimony should be apparent.

10 DISCUSSION

11 *Rule 15*

12 Rule 15 provides for pretrial depositions "[w]henever due to exceptional
13 circumstances of the case it is in the interest of justice that the testimony of a prospective
14 witness of a party be taken and preserved for use at trial." F.R.C.P. 15(a). This Court has
15 broad discretion to permit depositions pursuant to Rule 15. United States v. Omene, 143
16 F.3d 1167, 1170 (9th Cir. 1998). The court may allow pretrial depositions even if there
17 has not been a conclusive showing that the witness will be unavailable or that the
18 testimony will be material. As the Ninth Circuit has explained: Rule 15(a) does not require
19 any conclusive showing of "unavailability" or "material testimony" before a deposition
20 can be taken in a criminal case. Rule 15(a) only requires that the trial court find that due
21 to exceptional circumstances it is in the interest of justice that the testimony of a
22 prospective witness be taken and preserved for possible use at trial. Id. "Whether to grant
23 or deny a motion to depose a proposed witness in a criminal trial is discretionary." Furlow
24 v. United States, 644 F.2d 764, 767 (9th Cir. 1981). "The district court retains broad
25 discretion in granting a Rule 15(a) motion, and considers the particular circumstances of
26 each case to determine whether the 'exceptional circumstances' requirement has been
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28

1 satisfied." United States v. Farfan-Carreón, 935 F.2d 678, 679 (5th Cir. 1991).

2 *Unavailability*

3 Here, Alice Anyanwu is a native and citizen of Nigeria. With respect to
 4 unavailability, counsel is aware that the mere fact that a witness resides in a foreign
 5 country does not demonstrate her "unavailability" for Rule 15 purposes. United States v.
 6 Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989). However, Alice Anyanwu does not
 7 presently have the legal authorization to enter the United States and testify at trial in this
 8 matter. She could apply for a non-immigrant visa for a temporary stay in the United States
 9 when a trial date is set. However, it is impossible to estimate the time required by the U.S.
 10 immigration authorities in Nigeria¹ to process such an application assuming one would
 11 even be approved. It is virtually guaranteed that the United States immigration officials
 12 will expect her, like any such applicant, to identify the time period she wishes to visit the
 13 United States. Until a trial date is set, she cannot do so. A potential witness is unavailable
 14 for purposes of Rule 15(a), however, whenever a substantial likelihood exists that the
 15 proposed deponent will not testify at trial. United States v. Drogoul, 1 F.3d 1546, 1553
 16 (11th Cir. 1993). Therefore, unless the United States sees fit to engineer the issuance to
 17 her of a limited visa for the sole purpose of testifying at trial, defendant Ashiegbu will
 18 likely be deprived of Alice Anyanwu's testimony absent the taking of a Rule 15
 19 deposition. Thus, there is an issue of unavailability present even though the Court need
 20 not so find in order to find exceptional circumstances requiring a Rule 15 deposition.

21 *Materiality*

22 This case - as it relates to Andrew Ashiegbu - has the potential to be quite simple
 23 and straight-forward. Either three people lived together or they did not. If they did, as
 24 Alice Anyanwu will testify, then defendant Ashiegbu is not guilty of making a False
 25 Statement on an Immigration Document as alleged in Count Two because his Declaration
 26 which forms the basis of that charge is truthful. In like fashion, it would then follow that
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28 ¹ There is a United States Embassy in Abuja and a United States Consulate in Lagos. Both are formally referred to as divisions of the United States Diplomatic Mission to Nigeria

1 he is also not guilty of Conspiracy to Make False Statements as alleged in Count Four if
2 the basis for that charge is that he assisted co-defendant Doris Anyanwu with a false
3 Declaration.

4 The government indicates that it will produce defendant Ashiegbu's ex-wife to
5 testify that the three people did not live together. Unless one of the defendants elects to
6 testify, the ex-wife's arguably biased testimony will go unchallenged. As a result, the
7 testimony of Alice Anyanwu will be of unquestioned materiality since it will exculpate
8 Andrew Ashiegbu. In a case with a central theme as simple as exists here, each item of
9 evidence and each nuance in testimony will be scrutinized by the jury more so than in a
10 case where themes and issues abound.

11 *Exceptional Circumstances*

12 In combination, the unavailability of Alice Anyanwu and the materiality of her
13 testimony create an exceptional circumstance such that the interests of justice will be best
14 served by allowing the deposition of Ms. Anyanwu. Without her testimony, defendant
15 Ashiegbu loses an important part of his case-in-chief and finds his defense hamstrung by
16 the resulting pressure to testify on his own behalf.

17 *Letter Rogatory is Unnecessary*

18 F.R.C.P. 15 (d) authorizes the taking of foreign depositions by means of a letter
19 rogatory. Since Nigeria is not one of the countries having an active Mutual Legal
20 Assistance Treaty with the United States², and since defendants do not have the authority
21 to utilize MLAT to obtain witness testimony or documents, defendant Ashiegbu would
22 have to make such request by means of a letter rogatory in the event compelling the
23 witness was necessary. Here, Alice Anyanwu is willing to appear at either location, Lagos
24 or Abuja, and be deposed without compulsion. The U.S. Department of State has
25 published a schedule of fees for Judicial Assistance Services performed by the United
26 States Diplomatic Mission to Nigeria and among them are fees for the scheduling and
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28 ² A treaty was signed on September 9, 1989, but is still awaiting Nigeria's approval.

1 arranging appointments for depositions. See Exhibit 1, attached hereto. Therefore, it is
2 proposed that the deposition take place at either location depending upon availability of
3 Department of State staff.

4 **CONCLUSION**

5 For the reasons set forth above, defendant Andrew Ashiegbu respectfully requests
6 that his Motion be granted.
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12 Dated: May 14, 2008

Respectfully submitted,

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15 JAMES PHILLIP VAUGHNS
16 Attorney for Andrew Ashiegbu
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EXHIBIT 1



UNITED STATES DIPLOMATIC MISSION TO
NIGERIA

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SCHEDULE OF FEES

Judicial Assistance Services

Item No	Fee
Processing letters rogatory and Foreign Sovereign Immunities Act (FSIA) judicial assistance cases, including providing seal and certificate for return of letters rogatory executed by foreign officials:	
51. [51-LETTERS ROGATORY]	\$735
.....[52-FSIA]	\$735
52. Taking depositions or executing commissions to take testimony:	
(a) Scheduling/arranging appointments for depositions, including depositions by video teleconference (per daily appointment) [53-ARRANGE DEPO]	\$475
(b) Attending or taking depositions, or executing commissions to take testimony (per hour or part thereof) [54-DEPOSE/HOURLY]	\$265 per hour plus expenses
(c) Swearing in witnesses for telephone depositions [55-TELEPHONE OATH]	\$265
(d) Supervising telephone depositions (per hour or part thereof over the first hour)..... [56-SUPERVISE TEL DEPO]	\$265 per hour plus expenses
(e) Providing seal and certification of depositions. [57-DEPOSITION CERT]	\$70
53. Exemptions: Deposition or executing commissions to take testimony. Fees (item 42) will not be charged when the service is performed:	
(a) At the direct request of any Federal Government agency, any State or local government, the District of Columbia, or any of the territories or possessions of the United States (unless significant time required and/or expenses would be incurred) [58-JUDICIAL EXEMPT]	NO FEE
(b) Executing commissions to take testimony in connection with foreign documents for use in criminal cases when the commission is accompanied by an order of Federal court on behalf of an indigent party [59-INDIGENT TEST]	NO FEE

(Items no. 54 through 60 vacant.)

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